(18)

Office - Supreme Court, U. S.
FILED
JUN 26 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 121

PAUL H. BARNES,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA EX REL. EMMA K. BARNES

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA AND BRIEF IN SUPPORT THEREOF.

CHARLES S. THOMPSON,
GEORGE W. CUPP, JR.,
Counsel for Petitioner.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Opinions, decrees and orders below	2
Jurisdiction	2
Questions presented	2
Statement	3
Reasons for allowance of writ	9
Conclusion	10
Brief in support of petition	11
Opinions below	11
Jurisdiction	11
Statement	12
Specification of assignment of error	12
Argument	14
Conclusion	25
Appendix—A	27
B	28
C	30
D	32

Table of Cases Cited.

Martocello v. *Martocello*, 148 Pa. Sup. Ct. 40	5, 6
Pennsylvania v. *O'Keefe*, 298 Pa. 169	9, 22
Pennsylvania v. *Petrillo*, 12 A. (2d) 317, 338 Pa. 65	18
Pennsylvania v. *Petrillo*, 19 A. (2d) 288, 341 Pa. 209	18
Powell v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158	22
Smith v. *O'Grady*, 312 U. S. 329, 85 L. Ed. 859	18

Statutes Cited.

Judicial Code, Sec. 237(b), as amended	11
Pennsylvania Penal Code of June 24, 1939, P. L. 872, Sec. 731; Purden's Penna. Stats, Annotated, Permanent Ed., Title 18; Section 4731; Penal Code of 1939, Sec. 733; Purden's Sec. 4733	23, 24

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 121

PAUL H. BARNES,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA ex Rel. EMMA K. BARNES

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Paul H. Barnes, a resident and a citizen of the City and County of Philadelphia, Commonwealth of Pennsylvania, prays for a Writ of Certiorari to the Superior Court of Pennsylvania, to review an Order of the Supreme Court of Pennsylvania, entered March 26, 1943, (R. 120, 121), refusing his Petition for a review of a Judgment of the Superior Court of Pennsylvania, entered January 28, 1943 (R. 93), and an Order of said Superior Court of Pennsylvania, entered February 17th, 1943 (R. 106),

refusing his Petition thereto asking for a Re-Argument of the said Cause.

Opinions, Decrees and Orders, Below.

Decree of Judge Piekarski, Municipal Court of Phila., July 3, 1942 (R. 89).

Opinion of Judge Piekarski, Municipal Court of Phila., Sept. 15, 1942 (R. 89).

Opinion of Judge Rhodes, Superior Court of Penna., January 28, 1943 (R. 93).

Order of Judge Rhodes, Superior Court of Penna., February 17, 1943 (R. 106).

Order of the Supreme Court of Pennsylvania, entered March 26, 1943 (R. 120).

Jurisdiction.

The Order of the Supreme Court of Pennsylvania dismissing your Petitioner's Petition for review of the decisions of the Superior Court of Pennsylvania was entered March 26, 1943 (R. 120, 121). The jurisdiction of this Court is invoked under Sec. 237 (b) of the United States Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

1. Did the courts below err in denying your Petitioner's Petition for Vacation or Substantial Reduction of Order of Support against him, and in so doing deny him "Due Process of Law":

   (a) In denying your Petitioner "the equal protection of laws"?

   (b) In basing their decision on non-existing facts and by thus abusing their discretion, denying your Petitioner "Due Process of Law"?

2. Did the courts below err when they, in effect, refused your Petitioner the "Assistance of Counsel" in this a criminal case?

Statement.

Relevant Prior Proceedings.

On October 1, 1929 (R. 1.) on relation and Petition of your Petitioner's wife, Emma K. Barnes, for an order of Support, the Commonwealth of Pennsylvania prosecuted your Petitioner in the Domestic Relations Division of the Municipal Court of Philadelphia, Pennsylvania, in accordance with Title 18, "Crimes and Offenses", Chapter 5, Sections 1251-1258, Purdon's Penna. Statutes Annotated, Permanent Edition, for Non-Support of his said wife, which crime is therein designated a "misdemeaner".

On January 3, 1930, Walsh, J., of said Court, made an Order upon your Petitioner for $20. per week for said wife (R. 1); reduced by said Walsh, J., after hearing August 5, 1932, to $10. per week (R. 2), and remained at that sum until August 3, 1938 when it was reduced by Tumolillo, J., of said Court, to $5. per week (R. 2); but on August 30, 1939 said Order was increased by Piekarski, J., of said Court, on the wife's Petition for Increase, to $20. per week (R. 2), and said Order of August 30, 1939, was affirmed by Brown (President) Judge of said Court, on your Petitioner's Petition to Review same, November 21, 1939 (R. 3); but on your Petitioner's appeal to the Superior Court of Pennsylvania, as of No. 24 October Term, 1940, said Order of August 30, 1939 was reduced by that Court, Rhodes, J. (reported in Commonwealth ex rel. Emma K. Barnes v. Paul H. Barnes, 140 Pa. Superior Court 397, June 24, 1940) to $15. per week and Remittitur filed by said Superior Court July 5, 1940 (R. 3).

PRESENT PROCEEDINGS

On October 23, 1941, your Petitioner filed in said Municipal Court of Philadelphia, his Petition and Rule to show cause why the Support Order against him, of August 30, 1939, of $15. per week should not be vacated or substantially reduced because of his adversely changed financial condition. (R. 3-5); Hearings were held November 25, 1941 (R. 9) and March 27, 1942 (R. 61) before Piekarski, J. who on July 3, 1942 filed his Decree (R. 3, also R. 89) dismissing your Petitioner's said Petition, and filing his Opinion in support of his said Decree, September 15, 1942 (R. 3 and 89).

On July 25, 1942, your Petitioner appealed from the said Decree of Piekerski, J., of July 3, 1942, to the Superior Court of Pennsylvania (R. 91), and on July 25th, 1942 Writ of Certiorari issued out of the said Superior Court to said Municipal Court (R. 3 and 91); on September 24, 1942, Your Petitioner filed his Assignment of Error, to wit, that Piekarski, J. had erred in entering his said Decree of July 3, 1942 (R. 92-93); on November 12, 1942 Argument was had on said appeal, as of No. 259 October Term, 1942, before the said Superior Court (R. 92); on January 28, 1943, Rhodes, J., of said Superior Court, filed his Opinion saying: "The order of the court below dismissing petition is affirmed"; on February 8, 1943, Your Petitioner filed his Petition with the said Superior Court for Re-Argument (R. 92, 96-106); February 17, 1943 said Petition for Re-Argument was refused (R. 92 and 106); on March 11, 1943 your Petitioner filed his Petition for Allowance of Appeal from the said Superior Court to the Supreme Court of Pennsylvania (R. 92 and 107-120); on March 19, 1943, Appellee's Answer to said Petition for Allowance of Appeal, filed (R. 92, 121-123); on March 24, 1943, De-

fendant-Appellant's (your Petitioner's) Replication filed (R. 92 and 123-129) (also indexed in Record, page 111, as "Reply to answer to petition for allowance of appeal"); March 26, 1943, your Petitioner's said Petition for Allowance of Appeal to the Supreme Court "dismissed. Per Curiam."

SPECIFICATION of the stage in the PROCEEDINGS in the COURTS below, at which, and the manner in which the foregoing FEDERAL QUESTIONS sought to be reviewed were raised.

Question 1—Arising Question of denial to Petitioner of Due Process of Law.

(a)—In denying your Petitioner "the equal protection of the laws."

(b)—In basing their decision on non-existing facts and thus denying your Petitioner "Due Process of Law."

This denial by the Courts below occurred by their failure to apply to your Petitioner the established well-known principle of law as laid down in the recent like case of *Martocello* v. *Martocello*, 148 Pa. Superior Ct. 40 (1942) which says that in making an Order of Support the Court shall take into consideration the wife's separate income or earnings. And by a misconception of the facts as to Petitioner's wife's income at the time the Order of August 30, 1939 was made, whereby, without basis of fact, Rhodes, J. in his Opinion of January 28, 1943 (R. 96) stated her income now (during the accounting period of September 1, 1940 to August 31, 1941) was less than when said Order of $15. was made (August 30, 1939), thus resulting in abuse of the Court's discretion and depriving your Petitioner of his rights and property without "Due Process of Law."

Your Petitioner brought up this matter of his wife's separate income in paragraph 6 of his Petition to the Municipal Court of Philadelphia October 23, 1941 (R. 5), and at the Hearing of November 25, 1941 by calling the Girard Trust Company, Trustee of the Charles W. Klauder Estate, (deceased father of Mrs. Barnes) showing her income of $1151.78 paid her by said Estate for the said Accounting period (R. 60) and by calling Mrs. Barnes for cross examination and examining her in respect thereto, and in respect to her additional income of $67.50 from her stocks (R. 50-51) and as to her $200. bank deposit (R. 52) and again by recalling Mrs. Barnes at the Hearing of March 27, 1942 in respect to her said bank account (R. 74-75, 78-80, 88-89).

That in your Petitioner's Brief filed with the said Municipal Court, your Petitioner specifically asked in (paragraph) Point (y) page 10 thereof, the Court to consider his wife's separate income. See Appendix A.

And your Petitioner in his printed Brief before the said Superior Court brought up the matter at page 1 thereof (See Appendix B), and again forcefully argued it in argument of said question 2 (pages 6-8 of his said printed Brief) and Question 8 (page 1 and argued page 18 of his said printed Brief (Appendix B)).

In his Opinion of January 28, 1943, Rhodes, J. in the said Superior Court acknowledged the principle of law laid down in *Martocello* v. *Martocello,* 148 Pa. Superior Ct. 40 (1942) Stadfeld, J., but said that (R. 96):

> "the income which appellant's wife receives from her separate estate is now less than when the present order of $15 per week was entered."

Still, again, your Petitioner brought up this matter of his wife's separate income not actually having been taken into consideration in accordance with the *Martocello* v.

Martocello principle of law, in this like case, and of the absolute lack of evidence as to his wife's income in 1939 when said Order of $15 per week was made, in his Petition for Re-Argument before the Superior Court (R. 102 (7), R. 103 (8), R. 104-105). But that Court in its Order of February 17, 1943 dismissing your Petitioner's said Petition for Re-Argument entirely ignored the same (R. 92, 106).

Then, once more, your Petitioner, in his Petition to the Supreme Court of Pennsylvania for Allowance of an Appeal from the said Superior Court, raised this question (R. 114-115—Question C), but again it was entirely ignored in a "Per Curiam" decision without Opinion, dismissing said Petition.

Question 2—Petitioner's Counsel fees and legal expenses.

These Counsel fees and legal expenses were included in your Petitioner's "Expenses-Personal Income", "Exhibit A" (R. 6H, 6J, 6K) attached to your Petitioner's Petition of October 23, 1941 to the Municipal Court of Philadelphia, and for which your Petitioner claimed deduction from his income as therein set forth.

Your Petitioner, at Hearing of November 25, 1941, testified respecting Counsel fees paid by him during the "Exhibit A" accounting period (R. 15-16).

Your Petitioner in his Printed Brief handed up to the said Superior Court at the Argument, November 12, 1942, attacked the lower Court's denial of his reasonable deductions for his Counsel fees and legal expenses, as error, in Question 5 (page 1 of said printed Brief) and argued under that Question 5 (page 14 of said printed Brief) (See Appendix—B).

Judge Rhodes, of said Superior Court, in his Opinion of January 28, 1943, as to this Question said:

> "For example, items of expense included therein" ("Exhibit A") (R. 6A-6M) "which are clearly not

allowable for the purpose of determining the extent of his ability to pay a support order are: "* * *" (3) $325 (at least) for legal services in the course of this proceeding. The right of appellant's wife to support from him has been adjudicated, and there could be no justification to charge as expenses against his income, attorney fees and legal expenses incurred in his effort to vacate or reduce the amount of the support order" (R. 94).

Your Petitioner in his Petition to said Superior Court for Re-Argument raised this question of the denial of your Petitioner's deductions for Counsel fees and legal expenses as a Constitutional question under both the Constitution of Pennsylvania and the Constitution of the United States as a denial of your Petitioner's fundamental rights and a violation of his guarantees of "Due Process of Law" under Amendment XIV, Section 1, of the Amendments to the Constitution of the United States (R. 98 (3), 99-100). But said Superior Court in its Order of February 17, 1943 entirely ignored this question and your Petitioner's Constitutional argument thereon.

Again in your Petitioner's Petition to the Supreme Court of Pennsylvania for allowance of appeal thereto from said adverse decisions of said Superior Court, your Petitioner raised his objection to said denial to him of his deductions for Counsel fees and expenses in this Proceeding, as denying him his rights, fundamental and constitutional, under the Bill of Rights of both the Constitutions of Pennsylvania and of the United States, and referred the said Supreme Court of Pennsylvania to your Petitioner's forceful arguments on this Question in his printed Brief and in his Petition to said Superior Court for Re-Argument, aforementioned, both of which were handed up to said Supreme Court of Pennsylvania with your Petitioner's said Petition for allowance of said appeal from said Superior Court to said Supreme

Court of Pennsylvania (R. 116 (3)). But your Petitioner's said Petition was dismissed, March 26, 1943 by said Supreme Court: "Per Curiam", without an Opinion, and your Petitioner's said Constitutional rights and their said violation and denial, totally ignored.

Reasons for Allowance of Writ.

1. The failure of the Courts of Pennsylvania to impartially apply, in the instant case, the established and well-known law of Pennsylvania, as laid down in the like recent case, *Martocello* v. *Martocello,* (supra),—that the wife's separate income, or earnings, is to be taken into consideration in fixing the amount of a support order,—thus discriminating against your Petitioner and denying him the equal protection of the laws.

2.—That the Courts of Pennsylvania have abused their discretionary power in the instant case in saying the wife's income is less now than when said Order of $15 per week was entered when no testimony then on which to base such a statement, and by so doing, discriminated against your Petitioner, and have deprived your Petitioner of his rights and property without "Due Process of Law"; and in such case there is no discretion in the State Courts when a Citizen's Constitutional rights are infringed. See Commonwealth of Pennsylanvia *vs.* O'Keefe, 298 Pa. 169 (1929) Walling, Justice.

3.—The failure of the Courts of Pennsylvania to recognize your Petitioner's right to the services of Counsel in this criminal proceeding, whereby the Commonwealth of Pennsylvania is abridging the rights, privileges and immunities of your Petitioner as a citizen of the United States.

And as said reasons are more fully developed in Petitioner's "Supporting Brief" attached hereto.

Conclusion.

Also, it is to be noted by your Honorable Court that this is not a case dealing alone with the civil rights of one man, —*although your Petitioner's civil rights are sacred and entitle him to this, HIS, APPEAL TO YOU FOR THEIR PROTECTION,*—but it RAISES QUESTIONS OF THE CIVIL RIGHTS OF A GREAT BODY OF CITIZENS OF THE UNITED STATES OF AMERICA in the ever increasing, important, law of Domestic Relations,—a fact which is clearly shown by the published Reports in the instant case in the Courts of Pennsylvania,—for one instance thereof, see 30 A. 2d (No. 3 Advanced Sheet of March 13, 1943, pages 385 to 472) at pages XII and XIII and 437, et seq., thereof, where the importance of the questions raised in the instant case in respect to their bearing on the law of Domestic Relations, *generally,* is shown by the detailed index citations and "Headnotes" thereto.

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be granted.

Dated June 26, A. D., 1943.

PAUL H. BARNES,
Petitioner.
CHARLES S. THOMPSON,
GEORGE W. CUPP, JR.,
Counsel for Petitioner.